DEWAN PERNIAGAAN MELAYU, MALAYSIA NEGERI JOHOR v. MENTERI BESAR JOHOR & ORS

HIGH COURT MALAYA, JOHOR BAHRU
MOHD NAZLAN GHAZALI JC
[APPLICATION FOR JUDICIAL REVIEW NO: 25-28-05-2013]
19 JANUARY 2017

CIVIL PROCEDURE: *Committal proceedings – Application for – Allegation of contempt of mandamus order that sought to enforce compliance with court order – Whether terms of mandamus order clear and unambiguous – Failure to specify time for compliance from date of mandamus order – Whether contempt charge rendered ambiguous – Whether ambiguity resolved in favour of contemnors*

The application for an order of committal against the three named respondents herein resulted from the alleged non-compliance by the respondents with the terms of a *mandamus* order dated 6 February 2014. The *mandamus* order compelled the respondents to adhere to the terms of two other court orders, namely the certificate of judgment and the consent order, both dated 14 January 2013. They arose given the non-compliance by the respondents with the terms of the first consent order dated 14 December 2009. Thus, the issuance of both the certificate of judgment and the second consent order were effectively based on the need to comply with the original terms of the first consent order. The applicant had asserted that despite numerous reminders, the respondents had failed to comply with the first consent order, resulting in the applicant applying for a certificate of judgment under s. 33(1) of the Government Proceedings Act 1956, which however then witnessed the parties again agreeing to enter into the second consent order on 14 January 2013, whereby a certificate of judgment was issued against the respondents in relations to prayers 2 and 3 of the first consent order. It was also agreed that the respondents were to comply with their obligations under prayers 2 and 3 of the first consent order within a period of three months from 14 January 2013. This would thus require full compliance by 14 April 2013. The upshot of the *mandamus* order was thus for all intents and purposes, in fact and under the law, for the respondents to comply with the terms of prayers 2 and 3 of the first consent order dated 14 December 2009.

Held (dismissing application with costs):

(1) There was no legal impediment to the institution of committal proceedings against the respondents. Order 73 r. 12 of the Rules of Court 2012, in particular, does not apply to exempt the respondents from such proceedings. The argument of the respondents that a committal proceeding against the first respondent, if made, would in effect be an order against the State Government was untenable and in any event not relevant as the parties were different legal entities. As such, the

A respondents' argument on the non-availability of the coercive committal remedy against the Ministers and government officers was misconceived and unsustainable. (paras 12, 15 & 17)

(2) The assertion that the respondents were not the authority to approve land alienation was not sustainable since the obligation embodied in the B first consent order which underpinned the *mandamus* order had been agreed by the respondents themselves in the consent order, as enforced by the *mandamus* order. Further, although prayers 1 and 2 of the first consent order did not refer to the State Authority, prayer 3 did make reference to the same which showed that the drafting and intention C behind it was specific and deliberate. The respondents had thus clearly contemplated and recognised the different roles played by the parties as stated in the first consent order. They could thus be taken to have agreed to assume the responsibility of procuring the requisite alienation. (paras 17 & 21)

D **(3)** Orders of court must be complied with strictly in accordance with their terms. Hence, the answer to the question of whether the fact that the respondents had taken various efforts to ensure compliance would excuse them from the charge of the non-compliances with the *mandamus* order, was in the negative. Otherwise parties could easily avoid E observance of a court order by merely showing efforts towards compliance even though there is no full compliance. It is either full compliance or non-compliance. (paras 27 & 28)

(4) The obligation of the respondents (as defendants in the first consent order) was not to approve or alienate the land in question. Instead they F were obliged to use their best endeavour to assist the applicant seeking the requisite approval. By no stretch of the imagination could it be contended that the said terms in the first consent order, as mandated by the *mandamus* order, imposed the obligation on the respondents to alienate land. Therefore, the court could not order a committal because G it certainly cannot be said that the respondents have failed in obeying the *mandamus* order. There was no such requirement in prayer 3. (para 39)

(5) The second consent order expressly provided for compliance to be made within three months after the date of the second consent order, which H expired well before the *mandamus* order was applied for, let alone granted. However, the *mandamus* order, which sought to enforce compliance with the second consent order, made no mention whatsoever of any extension of time for compliance from the date of the *mandamus* order. It is trite that an order will not be enforced by committal if its I terms are ambiguous. Since the standard of proof is proof beyond reasonable doubt, where there is ambiguity or doubt, the doubt must be resolved in favour of the alleged contemnor, in this case, the respondents. (paras 45, 47 & 50)

(6) Any committal proceedings premised on the alleged non-compliance with a court order which does not contain any specification of time for compliance is fundamentally flawed. Without time specification, a contempt charge is unmistakably ambiguous, and thus under the established principles, particularly concerning natural justice, cannot be allowed to stand, and is entirely unsustainable. In the absence of time specification anywhere in the *mandamus* order, it could not be said that the respondents had not complied with the *mandamus* order. Further, by the time the *mandamus* order was granted, the time for compliance stated in the second consent order had already lapsed. In any event, any doubt or ambiguity must be resolved in favour of the respondents. Accordingly, a finding of contempt of the *mandamus* order against the respondents beyond reasonable doubt could not be justified. (paras 56-59)

Case(s) referred to:

Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal [2011] 8 CLJ 766 FC ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad [1995] 4 CLJ 283 FC ***(refd)***

Dato' Seri Yusof Dato' Biji Sura v. BTM Timber Industries Sdn Bhd & Ors [2009] 5 CLJ 412 CA ***(refd)***

Dewan Perniagaan Melayu Malaysia Negeri Johor v. Menteri Besar Johor & Ors [2016] 1 CLJ 52 HC ***(refd)***

Granek Sdn Bhd v. Lew Wa Chow [1990] 2 CLJ 989; [1990] 2 CLJ (Rep) 80 HC ***(refd)***

Houng Hai Hong & Anor v. MBf Holdings Bhd & Anor And Other Appeals [1995] 4 CLJ 427 SC ***(refd)***

Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 FC ***(refd)***

Loh Eng Leong & Ors v. Lo Mu Sen & Sons Sdn Bhd & Anor [2004] 3 CLJ 675 CA ***(refd)***

M v. Home Office [1994] 1 AC 377 ***(refd)***

Mah Siew Keong v. Bayu Gamitan Sdn Bhd & Other Appeals [2002] 1 CLJ 695 CA ***(refd)***

PP v. Datuk Hj Harun Hj Idris (No 2) [1976] 1 LNS 184 ***(refd)***

Re Bramblevale Ltd [1970] 1 Ch 125 ***(refd)***

Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors [2012] 2 CLJ 849 FC ***(refd)***

Wee Choo Keong v. MBf Holdings Bhd & Anor And Another Appeal [1993] 3 CLJ 210 SC ***(refd)***

Legislation referred to:

Federal Constitution, arts. 4, 7, Eighth Schedule
Government Proceedings Act 1956, s. 33(1)
Rules of Court 2012, O. 42 r. 6(1), O. 45 rr. 5, 6, O. 73 r. 12

For the applicant - Malik Imtiaz Sarwar, Robert Lai & Fadzilah Mansor; M/s Jackson & Masacorale
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Reported by S Barathi

A

JUDGMENT

Mohd Nazlan Ghazali JC:

Introduction

B **[1]** This is an application for an order of committal against the three named respondents, being the alleged contemnors, documented in encl. 28. At the end of the hearing, I dismissed the application and stated the key reasons for my decision. This judgment contains the full reasons for my decision.

C

Key Background Facts

[2] The background to this application for an order of committal has been dealt with at length in my judgment which allowed the antecedent application for leave to institute contempt proceedings against the respondents, which is reported in *Dewan Perniagaan Melayu Malaysia Negeri Johor v. Menteri Besar* D *Johor & Ors* [2016] 1 CLJ 52; [2016] 7 MLJ 1; [2016] 1 AMR 20, and [2016] 2 MLRH 31.

[3] This application resulted from the alleged non-compliance by the respondents with the terms of a *mandamus* order dated 6 February 2014. Specifically, the relevant parts of the notice of application for the order of E committal states as follows:

> (1) That each of the following (together, the "Proposed Contemnors"):
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> (a) Menteri Besar Johor ("First Proposed Contemnor");
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> (b) Pengarah Tanah & Galian Negeri Johor ("Second Proposed F Contemnor"); and/or
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> (c) Unit Perancang Ekonomi Negeri Johor ("Third Proposed Contemnor")
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> be committed to prison and/or fined such amounts as may be deemed appropriate by this Honourable Court for the Proposed Contemnors' G contempt of this Honourable Court in disobeying the order of this Honourable Court dated 06.02.2014 granted in the underlying proceedings and/or interfering with the administration of justice in failing to comply with the said order; …

[4] It is thus apposite for reference be made to the terms of the *mandamus* H order. The key terms of the same read as follows:

> ADALAH DIPERINTAHKAN Semakan Kehakiman untuk suatu Perintah *Mandamus* memaksa Responden-Responden untuk *mematuhi sepenuhnya syarat-syarat dan kesan Perakuan Perintah bertarikh 14.1.2013 dalam Mahkamah Tinggi Johor Bahru Guaman Sivil No. 22-290-2005 dan Perintah* I *Persetujuan bertarikh 14.1.2013 dalam Mahkamah Tinggi Johor Bahru Guaman Sivil No. 22-290-2005 dan untuk melaksanakan dan melengkapkan sepenuhnya kewajipan dan tanggungjawab mereka kepada Pemohon di bawah Perintah-perintah tersebut*.
>
> (emphasis added)

[5] For clarity, perakuan perintah is the certificate of judgment and perintah persetujuan is a consent order, both dated 14 January 2013, and are themselves made in pursuance of the underlying first consent order of 14 December 2009. Thus the *mandamus* order compels the respondents to adhere to the terms of two other court orders, namely the certificate of judgment and the consent order, both dated 14 January 2013. They arose given the non-compliance by the respondents with the terms of the first consent order dated 14 December 2009. Thus, the issuance of both the certificate of judgment and the second consent order of 14 January 2013 are effectively based on the need to comply with the original terms of the first consent order of 14 December 2009.

[6] The applicant had asserted that despite numerous reminders, the respondents had failed to comply with the first consent order, resulting in the applicant applying for a certificate of judgment under s. 33(1) of the Government Proceedings Act 1956, which however then witnessed the parties again agreeing to enter into the second consent order on 14 January 2013, whereby a certificate of judgment was issued against the respondents in relations to prayers 2 and 3 of the first consent order. It was also agreed that the respondents were to comply with their obligations under prayers 2 and 3 of the first consent order within a period of three months from 14 January 2013. This would thus require full compliance by 14 April 2013.

[7] The upshot of the *mandamus* order is thus for all intents and purposes, in fact and under the law, for the respondents to comply with the terms of prayers 2 and 3 of the first consent order dated 14 December 2009.

[8] And now, the all-important first consent order, which in its entirety sets out the following:

> 1. The Defendants shall alienate and transfer to the Plaintiffs within six (6) months from the date of this Order two (2) acres of contiguous leasehold (99 years) land of international status free from encumbrances for commercial development located within the lands held under title deeds No. PTB 22055 HS(D) 446607 and PTB 22056 HS(D) 446608, both in Bandar Johor Bahru, the exact location and the plotting of the coordinates of these two (2) acres of land shall be shown in the plan attached to this Order and marked "A". These two (2) acres comprised reclaimed land to be alienated and shall be delivered by the Defendants to the Plaintiffs with infrastructure inclusive of road access to be delivered within two (2) years from date of this Order. Any extension must be mutually agreed by the Parties. The Plaintiff shall only be required to pay to the Defendants a nominal premium of RM1.00 for one (1) Block Title of the said two (2) acres;
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> 2. The Defendants shall alienate and transfer to the Plaintiff within six (6) months from the date of this Order not less than ten (10) acres of contiguous leasehold (99 years) land of international status free from encumbrances for mixed development held under title deed No. Mukim Pulai, Daerah Johor Bahru located in Bandar Uda Utama, bordered by Jalan Uda Utama 3/8 to the south and Sungai Melana to the north, as

shown in the plan attached to this Order and marked "B". The alienated land shall be of international status without any condition for low-cost housing imposed thereon and the Plaintiffs shall only be required to pay to the Defendants a normal premium for the said ten (10) acres;

3. The Plaintiffs may apply to the State Authority within two (2) years from the date of this Order and the Defendants shall identify the same for forty (40) acres of freehold land free from encumbrances for mixed development located within a fifty (50) kilometer radius of Johor Bahru Town. These forty (40) acres of land need not be contiguous provided each non-contiguous lot shall not be less than ten (10) acres each unless agreed by the Plaintiff for smaller acreage. The Defendants shall use its best endeavour to assist the Plaintiffs in getting approval of the said application of the Plaintiffs. The Plaintiffs shall only be required to pay to the Defendants a normal premium of the lots comprised in the said forty (40) acres.

4. Each party shall bear its own costs.

Summary Of Contentions Of Parties

[9] The respondents in their opposition to the granting of the order of committal against them raised a number of arguments, chief amongst which included the following:

(a) No order of committal may under the law be imposed against the respondents, being the Government;

(b) The proper party to give effect to the obligations under the first consent order pursuant to the *mandamus* order is the State Authority who is not a party in this action;

(c) The respondents have in any event been actively negotiating and working on proposals for the alienation of the lands contemplated in prayers 2 and 3 of the first consent order.

[10] The applicant contended that these arguments of the respondents are unmeritorious, and maintains that even as at the date of the hearing, prayers 2 and 3 of the consent judgment remain unfulfilled.

Evaluation And Finding Of This Court

[11] I will next examine the grounds submitted by the respondents and the arguments put forth by the applicant in opposition, and state my finding on the same. Again, unless necessary in the context, I will not in this judgment discuss the requirements of the law of contempt which I have dealt with in my judgment on the leave stage, as reported.

No Committal Order Can Be Made Against The Respondents?

[12] This is a question of law which I have dealt with at length in the judgment allowing leave. I will not repeat my analysis here. Suffice for me to reiterate that I have already made and now maintain the determination that there is no legal impediment to the institution of committal proceedings

against the respondents. Order 73 r. 12 of the Rules of Court 2012 in particular does not apply to exempt the respondents from such proceedings. I have also stated that this position is in line with case law authorities, most directly on point being the House of Lords decision in *M v. Home Office* [1994] 1 AC 377.

[13] This was what I have stated on this issue earlier:

> [55] Whilst the evolution of the law in Malaysia is no doubt a continuing process, as envisioned by Arifin Zakaria FCJ (now Chief Justice of Malaysia) in *Petrojasa*, the issue is whether the extent of the coercive powers of contempt of court would now also be available under present law to compel adherence to court orders such as reliefs granted under judicial review proceedings, against Cabinet Ministers as well as Menteri Besar of State Governments. It is my view, for the reasons that appear in this judgment that the landscape of constitutional and administrative laws in this country has sufficiently evolved and attained the sophistication and maturity deemed integral to the well- functioning of a democratic and civil society that the answer to the question is decidedly in the affirmative. It is most instructive to note that the specific issue of committal against Ministers is discussed in detail more than two decades ago in the leading English constitutional case of *M v. Home Office* [1994] 1 AC 377 referred to in *Minister of Finance, Government of Sabah v. Petrojasa Sdn Bhd* where the House of Lords firmly ruled that the courts have the jurisdiction to make coercive orders against the Crown or Ministers of the Crown. A minister can in law be found guilty of contempt in his official capacity.

[14] I concluded my finding on this issue that the law does not prohibit committal orders be imposed against the respondents in the following manner:

> [62] There is therefore in my view no overriding rationale that can justifiably militates against the notion of making Ministers and Government departments and officers subject to contempt proceedings. As stated, in the first place, O. 73 r. 12 excludes the application of O. 45 to 52 against only the Federal Government and State Governments. It does not extend to insulate Ministers or servants of the Government. Nor is there any demonstrably compelling basis to hold otherwise. This proposition is well in accord with the principles enunciated in important precedents which have developed the law on ministerial and governmental accountability such as *Petrojasa*, *Sabil Mulia* and most manifestly for present purposes, *M v. Home Office*. *Albeit* only of persuasive authority, the common law position in *M v. Home Office* which establishes that a finding of contempt is capable under the law to be made against Ministers is neither divergent from nor in any way repugnant to the fundamental tenets underpinning the corpus of our domestic laws such that in my judgment, *M v. Home Office* also accurately represents the position under Malaysian law. Nor does the Government Proceedings Act 1956 or the Specific Relief Act 1950 expressly prohibit the institution of such contempt proceedings. As for the second and third proposed contemnors, I shall not attempt to do more than refer to the case of

Lembah Mayang Sdn Bhd & Ors v. Pengarah Jabatan Perhutanan & Anor [2004] 6 CLJ 465 where the Pengarah Jabatan Perhutanan was found guilty of contempt of court, and indeed punished with a fine of RM1,000 in default of one month imprisonment. The argument that committal proceedings are not available against the second and third proposed contemnors is thus wholly misconceived.

[15] I have also made the ruling that the argument of the respondents that a committal proceeding against the first respondent, if made, would in effect be an order against the State Government to be untenable and in any event not relevant as the parties are different legal entities.

[16] As such, the respondents' argument on the non-availability of the coercive committal remedy against Ministers and Government officers is misconceived and unsustainable.

The State Authority Is The Entity With Authority To Alienate, And Not The Respondents?

[17] This contention, which had also been raised earlier at leave application stage, is similarly untenable and has been dealt with in my judgment granting leave. This assertion that the respondents are not the authority to approve land alienation is not sustainable since the obligation embodied in the first consent order which underpins the *mandamus* order have been agreed by the respondents themselves in the consent order, now enforced by the *mandamus* order. I have held earlier, and in this instant proceeding, I maintain the finding that the respondents never raised this before the contempt proceedings were initiated and are thus estopped from doing so now.

[18] This was what I said in my judgment when granting leave:

> [66] Secondly, the first and second consent orders, by definition are rightfully orders recorded by the court by consent of the parties and in this case were supposed to have represented the resolution of the dispute initiated by the civil suit. In this case, based on the O. 52 statement and requisite affidavit in support, the settlement actually arose from the initiative of the proposed contemnors. As noted earlier, despite the first and second consent orders, this matter remained unresolved and subsequently witnessed further proceedings which culminated in the *mandamus* order. But the parties have remained the same throughout. The proposed contemnors do not in any event now say that the argument about the State Authority being the lawful authority had ever been raised before in any of the earlier proceedings. The doctrine of estoppel may thus apply in the instant case against the proposed contemnors and in my view would not be objectionable because the issue of whether one is a correct party to the proceedings which first started about a decade ago does not involve the risk of preventing the exercise of a statutory duty, which would otherwise proscribe the application of estoppel (*Public Textiles Bhd v. Lembaga Letrik Negara* [1976] 1 LNS 120; [1976] 2 MLJ 58). As such, at this stage of leave application, and in the absence of a fuller ventilation

of the issues with the benefit of affidavit evidence from the proposed contemnors, I am persuaded to form the view that the proposed contemnors would be estopped from asserting the said argument.

[19] Similarly, the principle concerning estoppel as enunciated in the leading Federal Court case of *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad* [1995] 4 CLJ 283; [1995] 3 MLJ 331 would apply. In *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 3 CLJ 305, Gopal Sri Ram JCA (as he then was) held that:

In the context of litigation, it usually arises where a party to an action has at least two alternative and mutually exclusive courses open to him. If by words or conduct he elects to pursue one of them and thereby leads his opponent to believe that he has abandoned the other, he may, if the circumstances so warrant, be precluded from later changing course. Decisions upon the application of the doctrine to litigation are but mere illustrations of the broader proposition. Indeed this is true of all cases where the doctrine has been applied to other spheres of human activity.

[20] There is nothing in the affidavits filed on behalf of the respondents by a deputy director attached to the office of the second respondent for the purposes of this hearing which provides any new arguments or information on this point which is also essentially one of law.

[21] Further, although prayers 1 and 2 of the first consent order do not refer to the State Authority, prayer 3 did make reference to the same which goes to show that the drafting and intention behind it was specific and deliberate. The respondents had thus clearly contemplated and recognised the different roles played by the parties as stated in the first consent order. They could thus be taken to have agreed to assume the responsibility of procuring the requisite alienation.

[22] In addition, under cl. 1(1) of the Eighth Schedule to the Federal Constitution and arts. 4 and 7 of the Law of the Constitution of 1895 for the State of Johore and pursuant to the decision of Raja Azlan Shah FJ (as His Highness then was) in *PP v. Datuk Hj Harun Hj Idris (No 2)* [1976] 1 LNS 184; [1977] 1 MLJ 15, it would be safe to state that the State Authority is the executive committee of the State and is chaired by the first respondent. This was what I said in the earlier judgment:

[68] Thus it is not disputed that the Menteri Besar is not only not the State Authority but is also not the Executive Council. But he is the Chairman of the Executive Council, and is for all intents and purposes effectively the Chief Executive of the State Government. It is therefore not unreasonable to postulate that given the possible and not insignificant degree of influence the position of a Menteri Besar wields in matters concerning state administration, the proposed contemnors' non-objection to being named as parties from the time of the institution of the civil suit was precisely because they were in a position capable of ensuring or procuring the requisite alienation of the relevant lands to the applicant by the State Authority, *albeit* at the same time taking on the risk of not

A ultimately being successful in securing the said alienation. But the pertinent point is this does not translate into the proposed contemnors being excused from performing their obligations under the *mandamus* order. In other words, I do not view prayers 1 and 2 of the first consent order to be especially legally objectionable or in any way conceptually flawed because they can be construed as sufficiently wide to admit of the
B obligations undertaken by the proposed contemnors to procure the contemplated and promised land alienation.

[23] As such, this contention of the respondents too is devoid of merit and cannot help their resistance to this application.

C *Respondents Have Actively Negotiated With Applicant*

[24] The respondents argued that the applicant did not disclose the full background facts pertaining the discussions that had taken place amongst various parties which the applicant was aware of which clearly showed that the respondents had taken the efforts and steps towards ensuring compliance
D with the *mandamus* order.

[25] I am of the view that the fact that the respondents had taken steps towards compliance cannot be disputed. As clearly evidenced in the letter dated 18 June 2013 from Jabatan Pengairan dan Saliran Johor exhibited by the applicant, the application for the alienation of the 10 acres (referred to
E in prayer 2 of the first consent order mentioned in the *mandamus* order) had been refused by the State Executive Committee in its meeting of 26 March 2013. Similarly, the letter dated 17 July 2013 from Pejabat Tanah Johor Bahru confirmed that the application in respect of the 40 acres (which concerns prayer 3 of the first consent order) was still being evaluated.

F **[26]** The respondents also sought to argue that these letters also demonstrate that the authority to alienate is legally not vested in them such that any breach of the *mandamus* order cannot be attributed to them. This argument is untenable for the reasons I have stated earlier in this judgment.

G **[27]** The more pertinent point is whether the fact that the respondents had taken various efforts to ensure compliance would excuse them from the charge of the non-compliances with the *mandamus* order. The short answer is resoundingly in the negative. Otherwise, parties can easily avoid observance of a court order by merely showing efforts towards compliance even though there is no full compliance. It is either full compliance or
H non-compliance.

[28] It cannot be emphasised enough that orders of court must be complied with strictly in accordance with their terms. If a consent order requires a state of affairs to be achieved, the only way the order can be complied with is by
I achieving that state of affairs. It is manifest that the state of affairs prescribed in the *mandamus* order is the alienation of the lands referred to in prayers 2 and 3 of the first consent order. It is not disputed that that has not been achieved. The obligations to effect the requisite alienation and transfer has clearly not been complied with (however, see further below).

[29] It is also not disputed that respondents had even taken other steps towards ensuring compliance with the *mandamus* order, and had even had discussions with the applicant after the leave to commence the instant committal proceedings was granted. Letters from various State Government agencies on the matter have been exhibited by the parties. But the state of affairs stated in the first consent order as prescribed by the *mandamus* order has still not been achieved.

[30] I must stress that the fact that the state of affairs on the alienation and the transfer of lands contemplated by the first consent order (as mandated by the *mandamus* order) has not been achieved is not disputed by the respondents. But they assert that they are not in breach of the *mandamus* order for the grounds which have been stated earlier in this judgment, all of which, as I have discussed, do not support their stance. It is after all trite law that orders of court must be treated with respect and require strict obedience (see *Wee Choo Keong v. MBf Holdings Bhd & Anor And Another Appeal* [1993] 3 CLJ 210; [1993] 2 MLJ 217).

[31] The respondents also argue that the applicant had infringed the principle against a party approbating and reprobating (see the Federal Court decision in *Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal* [2011] 8 CLJ 766; [2011] 6 MLJ 297). This, according to the respondents is by reason of the fact that the applicant had participated in the negotiations with the respondents with the view towards compliance with the *mandamus* order even though some of these efforts had taken place beyond the time fixed for compliance (if true). Yet the applicant now contends that the actions by the respondents did not comply with the time stipulated by the *mandamus* order.

[32] I do not consider this to be a valid contention. Whether the applicant was guilty of approbating and reprobating is in my view irrelevant to the key question of whether there was non-observance of the *mandamus* order. In any event, the applicant could not be expected not to take any action in response to the efforts by the respondents towards achieving compliance with the *mandamus* order. But the outcome of these efforts however does not represent adherence to the *mandamus* order. That remains to be the undisputed fact.

[33] Accordingly, all arguments of the respondents which concern the various steps and efforts taken by the respondents which are argued to have been done in order to ensure compliance with the first consent order as mandated by the *mandamus* order are unsustainable. They cannot ignore the fact that the state of affairs specified in the *mandamus* order has not been achieved. In my view, the *bona fides* of an alleged contemnor, and his reasons and understanding in respect of the acts done or failed to be done are more relevant to the mitigation of the contempt. There must be a distinction between the liability and the penalty for contempt.

A **Was There A Breach Of *Mandamus* Order?**

[34] Whilst the state of affairs contemplated in the first consent order referred to in the *mandamus* order has not been met, this does not automatically equate to the respondents having failed to observe the terms therein. It is of utmost importance that in each and every case of an
B application for an order of committal where the allegation concerns non-compliance with court orders, the terms of the court orders be carefully examined to ascertain if liability could be imposed on the alleged contemnors.

C **[35]** Thus, the principal issue before this court is whether the respondents have breached the *mandamus* order that would justify the order of committal be granted against them. Since the committal application concerns the *mandamus* order, the terms of the *mandamus* order ought rightfully to be the focus of my evaluation of whether or not there is a breach.

D *Important Set Of Principles On Contempt Charge*

[36] The law governing the grant of committal orders is fairly settled. A discussion on the same is unnecessary for the purposes of this instant application. However, as distilled from the various authorities, as a guide, I wish to reiterate, in summary fashion, four key principles that courts must
E take into account when examining the terms of the court orders contended to have been infringed or not complied with by an alleged contemnor. These are:

(a) Contempt proceedings are criminal in nature because they involve the liberty of the alleged contemnor (see the Federal Court decision in *Tan*
F *Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors* [2012] 2 CLJ 849);

(b) A charge of contempt must therefore be proved beyond reasonable doubt (see the English Court of Appeal decision in *Re Bramblevale Ltd* [1970] 1 Ch 125);
G

(c) It is a fundamental principle of fairness that no order of court will be enforced by committal unless it is expressed in clear and unambiguous language (see the Court of Appeal decision in *Dato' Seri Yusof Dato' Biji Sura v. BTM Timber Industries Sdn Bhd & Ors* [2009] 5 CLJ 412); and

H (d) Any ambiguity and uncertainty must be resolved in favour of the alleged contemnor (see the Supreme Court decision in *Houng Hai Hong & Anor v. MBf Holdings Bhd & Anor And Other Appeals* [1995] 4 CLJ 427).

[37] As I have stated earlier, the *mandamus* order compels compliance with
I the terms of the first consent order, the entirety of which has also been reproduced above.

Prayer 3 Does Not Oblige The Respondents To Transfer

[38] In respect of prayer 3, it is expressly stated thus:

> The Plaintiffs may apply to the State Authority within two (2) years from the date of this Order ...
>
> ... The Defendants shall use its best endeavour to assist the Plaintiffs in getting approval of the said application of the Plaintiffs ...

[39] It will be readily appreciated that from the above as appearing in prayer 3, it is clear that the obligation of the respondents (as defendants in the first consent order) is not to approve or alienate the land in question. Instead, they are obliged to use their best endeavour to assist the applicant seeking the requisite approval. By no stretch of the imagination can it be contended that the said terms in the first consent order, as mandated by the *mandamus* order, imposed the obligation on the respondents to alienate land. The court cannot therefore order a committal because it certainly cannot be said that the respondents have failed in obeying the *mandamus* order which required them to alienate and transfer the requisite 40 acres of land to the applicant. There is no such requirement in prayer 3 pure and simple.

[40] The obligation of the respondents in prayer 3 was, in the context, entirely to use their best endeavours to assist the applicant in getting the approval. On the evidence, given the steps taken, including the letters exhibited by the respondents, neither can the respondents be said, especially given the applicable standard of proof of beyond a reasonable doubt, to have breached their obligation to use their best endeavours to assist the applicant.

[41] Whilst a breach of prayer 3 could not be established on the basis of the terms stated therein, the same ground could not however be adopted to dispute a contention of non-compliance with prayers 1 and 2. This is plainly because the very opening words of these two prayers 1 and 2 impose a clear obligation on the respondents to effect the transfer and alienation. Both prayers explicitly started with "the defendants shall alienate and transfer to the plaintiff ... . The obligation on the part of the respondents is thus unmistakable and could not have been stated more clearly.

The Critical Indispensability Of Stipulation Of Time For Compliance

[42] But there is one other consideration that relates to the entirety of the first consent order that in my assessment considerably weakens if not entirely demolishes the case for the grant of the order of committal against the respondents. It is the stipulation on time for compliance with the stated obligation in prayers 1, 2 and even 3, for that matter. Most importantly, a central feature of the requirement that, as stated earlier, an order must be unambiguous, is that it must also specify time for compliance. I have raised this as an issue even during leave proceedings.

[43] Both prayers 1 and 2 specify that the obligation must be performed within six months. As stated earlier, this first consent order dated 14 December 2009 was not complied with earlier by the respondents. That led to the second consent order dated 14 January 2013 where it was agreed by the parties that the obligations under prayers 2 and 3 of the first consent order must be performed and complied with within a period of three months from 14 January 2013. This would thus require full compliance by 14 April 2013. This of course, as stated earlier, was again disobeyed by the respondents, resulting in the issuance of the *mandamus* order.

[44] And, crucially as stated earlier, the terms of the *mandamus* order, which is the order of court said to have been breached and is therefore the subject of this instant proceedings, merely require full compliance by the respondents with the second consent order without making any reference to any time period for compliance. This is so despite the second consent order having been carefully drafted to extend time for compliance given the deadline specified in the first consent order having long lapsed at the time when the second consent order was recorded.

[45] The second consent order expressly provided for compliance to be made within three months after the date of the second consent order. As stated, this three-month expired on 14 April 2013, well before the *mandamus* order was applied for, let alone granted. But the *mandamus* order which sought to enforce compliance with the second consent order made no mention whatsoever of any extension of time for compliance from the date of the *mandamus* order of 6 February 2014.

[46] If the second order saw it fit to have an extension of time, I cannot find any valid reason why the *mandamus* order could not have done the same. I do not think it is correct in principle for an extension of time of three months from the date of the *mandamus* order be implied and read into the terms of the *mandamus* order, as argued by counsel for the applicant.

[47] It is trite as mentioned earlier that an order will not be enforced by committal if its terms are ambiguous (see also *Mah Siew Keong v. Bayu Gamitan Sdn Bhd & Other Appeals* [2002] 1 CLJ 695). It bears repetition that since the standard of proof is proof beyond reasonable doubt, where there is ambiguity or doubt, the doubt must be resolved in favour of the alleged contemnor, in this instance case, the respondents (see *Houng Hai Hong & Anor v. MBf Holdings Bhd & Anor And Other Appeals* [1995] 4 CLJ 427; and *Dato' Seri Yusof Dato' Biji Sura v. BTM Timber Industries Sdn Bhd & Or* [2009] 5 CLJ 412; [2010] 1 MLJ 644).

[48] The concern on the absence of time for compliance was raised in the hearing for leave, as stated in the reported judgment. Counsel for the respondents who were invited to attend the *ex parte* hearing for leave however chose not to raise this issue. As I have stated in the judgment, at leave stage,

the focus ought to be on the sufficient particularity of the O. 52 statement. Other issues ought to be raised at the substantive stage like presently, with the support of averments and evidence in affidavits.

[49] The respondents did raise this issue in their written submissions for the substantive hearing for the order of committal by the applicant, *albeit* almost cursorily. At the hearing, the applicant suggested that (other than that the period of three months ought to be read into the *mandamus* order, which I have provided the reasons for my disagreement) this was an afterthought especially since it was never raised by the respondents and particularly given that the respondents themselves had taken efforts to achieve compliance even after the date of the *mandamus* order.

A Contempt Charge Based On Order Without Time Stipulation Is Defective

[50] I do not think this is a valid proposition for the simple reason that the failure of the respondents to raise the same earlier cannot operate against the alleged contemnor such as the respondents in a *quasi*-criminal proceedings where the applicant bears the burden of proving non-observance of the court order by the alleged contemnor beyond a reasonable doubt. A court order requiring compliance cannot form a basis of a charge of contempt if it makes no reference to the time for compliance. In the absence of a specification of time for compliance in respect of the terms in a court order, a charge of contempt is inherently defective and thus cannot ever succeed.

[51] Furthermore, in situations where the court examines whether or not there is a non-compliance with a court order, a finding of an ambiguity in terms of the court order, more so in respect of the stipulation of time for compliance which is absolutely integral to every court order without which the same cannot be enforced, cannot be validly displaced by evidence of the conduct of the alleged contemnor which is inconsistent with such ambiguity. The ambiguity is in any event, a finding made objectively of the terms in question. Thus subjectively, any misunderstanding of the terms on the part of the alleged contemnor, such as the failure of the respondents to appreciate the ambiguity of the terms at the material time, like not realising that there is no stipulation of time period for compliance, too is irrelevant.

[52] It is worthy of emphasis that the concern pertaining to the absence of time for compliance is a critical point that weighs considerably against the case of the applicant. This absence is not in keeping with firstly, O. 42 and O. 45 of the Rules of Court 2012 ("the RC 2012") on the requirement to specify time and secondly, a number of case law authorities which ruled that in the absence of such time specification, a court order is unenforceable and the party against whom it is made is entitled as of right to have it set aside (see the Court of Appeal decision in *Loh Eng Leong & Ors v. Lo Mu Sen & Sons Sdn Bhd & Anor* [2004] 3 CLJ 675; [2003] 1 AMR 206).

[53] Order 42 r. 6(1) of the RC 2012 provides that a judgment or order which requires a person to do an act shall specify the time after service of the order within which the act is to be done. The requirements of O. 42 r. 6 must be strictly adhered to before an order can be entered by reason of the failure of a party to do an act within a specified time. The focus, I reiterate, must be on the *mandamus* order, for it is well-established that it would be the terms of the order itself that must be looked at and examined in order to define the obligations imposed by it (see the Court of Appeal decision in *Dato' Seri Yusof bin Dato' Biji Sura*). It is abundantly clear that if time for compliance is not specified, establishing a case for committal becomes a near impossibility given the criminal nature of the proceedings requiring proof beyond reasonable doubt which further also emphasises the requirement for the order in question to be free from ambiguity, as well as, again, for any vagueness to be resolved in favour of any proposed contemnors.

[54] This proposition of law is also both logical and practical for it is difficult to appreciate how one can be ruled to be in breach of a court order if it is not imposed on him the time during which he is to perform the said task, especially one which is in the form of a mandatory obligation just like as stated in the prayers in the second consent order, more so when the charge is for a contempt of court. In addition, it is also stated in O. 45 r. 5 that an order may be enforced by an order of committal if a person required by an order to do an act within a time specified in the order neglects to do so within that time. If an order or judgment omits to incorporate time specification, O. 45 r. 6 may be resorted to in order to seek the intervention of the court to stipulate the time period for compliance. No such application had been made by the applicant in the instant case.

[55] The following passage from the judgment of Mohamed Dzaiddin J (later Chief Justice) in *Granek Sdn Bhd v. Lew Wa Chow* [1990] 2 CLJ 989; [1990] 2 CLJ (Rep) 80; [1991] 1 MLJ 125 is especially instructive:

> For the above reasons, in my judgment, the failure of the plaintiff to specify the time for the defendant to comply with the said order or the absence of a subsequent order fixing or extending such time makes the enforcement of the said order defective. It is unfortunate that I have to dismiss this application on a technicality, so to speak. However, as this is a committal proceeding against an individual, I think the rule governing the enforcement by the court of its order must no doubt be strictly followed.

[56] A failure to specify time for compliance must, in my view, unless remedied appropriately by a supplemental order, necessarily result in the dismissal of any application for an order of committal. I do not think however, that it is a mere technicality. It is a serious and fundamental defect. Without time specification, a contempt charge is unmistakably ambiguous, and thus under established principles, particularly concerning natural justice, cannot be allowed to stand, and is entirely unsustainable. In the absence of

time specification anywhere in the *mandamus* order, it cannot thus be said that the respondents in the instant case have not complied with the *mandamus* order since it is not stated by when they need to ensure compliance.

[57] By the time the *mandamus* order was granted, the time for compliance stated in the second consent order had already lapsed. Yet, I must emphasise that even general words such as "forthwith" or "immediately" are absent from the *mandamus* order which sought to enforce compliance with the second consent order. In contradistinction, the terms of the first consent order and the second consent order both manifestly specified the relevant time period for compliance.

[58] In the absence of time specification, it is clear beyond peradventure that the respondents cannot be held to have not complied with the *mandamus* order. At best the *mandamus* order is ambiguous and this would already render it unenforceable given the weight of case law authorities. And in any event, any doubt or ambiguity must be resolved in favour of the respondents. Accordingly, a finding of contempt of the *mandamus* order against the respondents beyond reasonable doubt cannot be justified.

[59] I reiterate that any committal proceedings premised on the alleged non-compliance with a court order which does not contain any specification of time for compliance is fundamentally flawed. Accordingly, I hold that the failure to specify time for compliance in respect of the *mandamus* order is absolutely fatal to the plaintiff's application for an order of committal against the respondents *vis-à-vis* the allegation of the latter' violation of the terms of the *mandamus* order.

Conclusion

[60] In conclusion, having considered the affidavit evidence and submissions by parties, it is my judgment that the applicant has fallen considerably short of and thus not succeeded in proving, beyond reasonable doubt, the contempt by the respondents of the *mandamus* order, primarily by reason of the failure of *mandamus* order to clearly specify time for its compliance in accordance with the applicable provisions of the RC 2012 and in violation of established principles governing charges for contempt. Accordingly, I dismiss this application for an order of committal against the three respondents, with costs.